FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 2 1982
Ross N. Lillard, Jr.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL MACK,)
)
Appellant,)
)
-vs-) No. F-80-407
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

FOR PUBLICATION

AUTHORIZED FOR FILING
MAR 2 1982
COURT OF CRIMINAL APPEALS

- O P I N I O N -

BUSSEY, Judge:

The appellant, Michael Mack, hereinafter referred to as the defendant, was convicted in the District Court of Tulsa County, Case No. CRF-79-1749, for the offense of Robbery with a Firearm, in violation of 21 O.S.Supp.1980, § 801, After Former Conviction of a Felony. He was sentenced to sixty (60) years' imprisonment, and he appeals.

On June 18, 1979, at approximately 9:20 p.m., the defendant and B.T., a juvenile, were in the parking lot of the Crystal City Shopping Center, and Paula Ruth Perkins was washing her car at a carwash at that location. The defendant and B.T. walked over to Ms. Perkins, where the defendant placed a revolver to her head, and told her to get into the back seat of the car and lie face down. She did as she was told to do, and the defendant and B.T. got into the car and drove around for approximately thirty (30) minutes. They stopped the car on the north side of Tulsa and told Perkins to get out. She got out and they drove away in the car. At no time did Ms. Perkins see the defendant or B.T.

After Ms. Perkins was released she went to the home of Jerry Harmon, who called the police. When the police arrived at the Harmon residence, Perkins told them what had happened and gave them a description of her car.

Early the following morning, at approximately 1:15 a.m., Tulsa Police Officer Jerry Cleary observed a vehicle which matched the description of Paula Perkins' car. The vehicle pulled into the

parking lot of the Soul Brother's Lounge, and the officer followed the car into the parking lot. He observed two people walking toward the lounge, one of whom he identified as the defendant and the other he identified as B.T. The two entered the lounge and came back out immediately. At that time, Officer Cleary took them into custody.

B.T. was taken to the police station where he gave a statement as to what had happened the previous evening. In that statement he told the officers where they could find the gun used in the robbery.

B.T. was sent to the juvenile correction center at Helena, for his part in the crime. He was released after his eighteenth (18th) birthday, which was approximately eight (8) days before the trial of the defendant, and he testified at the trial as a witness for the State.

I.

In his first assignment of error the defendant urges that the trial court committed fundamental error by failing to instruct the jury that "the jury is not to draw any inference from the fact that the defendant himself has not testified." The defendant contends that such an instruction is required by the United States Constitution, when requested, citing the recent Supreme Court decision of Carter v. Kentucky, _____ U.S. _____, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981).

In this jurisdiction the trial court is prohibited from making any mention of the defendant's failure to testify by statute, 22 O.S.1981, § 701. This Court has repeatedly held that to give an instruction on the defendant's failure to testify, such as the one the defendant in this case requested, is reversible error. Ellis v. State, 558 P.2d 1191 (Okl.Cr.1977); and Villines v. State, 492 P.2d 343 (Okl.Cr.1971). In Carter, supra, the Supreme Court stated that:

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. Malloy v. Hogan, 378 U.S., at 8, 84 S.Ct. 1489, 12

> L.Ed.2d 653. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. Griffin v. California, supra. Just as adverse comment on a defendant's silence 'cuts down on the privilege by making its assertion costly,' Griffin, 380 U.S., at 614, 85 S.Ct. 1229, 14 L.Ed.2d 106, 5 Ohio Misc 127, 32 Ohio Ops 2d 437, the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

Although we are bound by the decision of the Supreme Court, they did not hold that the ruling in Carter was retroactive, and in light of our previous rulings, we hold that the decision in Carter, should be applied prospectively only. See, Annotation 22 L.Ed.2d 821, "United States Supreme Court's Views as to Retroactive Effect of its Own Decisions Announcing New Rules." Accordingly, the defendant's first assignment of error must fail.

II.

In the defendant's next assignment of error he contends that the State failed to sufficiently corroborate the accomplice's testimony. It is not necessary to detail all the evidence involved. It is sufficient to say that the testimony of the accomplice, B.T., was corroborated in many details by other witnesses, including the victim. If there is one material fact that corroborates an accomplice's testimony the jury is free to infer the general truthfulness of the witness. Roberts v. State, 571 P.2d 129 (Okl.Cr.1977). Since the law prescribes no standard for strength of corroborating evidence, this Court will view that evidence in the strongest light. Leppke v. State, 559 P.2d 459 (Okl.Cr.1977). From an examination of the entire record we are of the opinion that the jury was presented with sufficient evidence to infer that B.T. gave truthful testimony. Therefore, we reject this assignment of error.

III.

The final contention is that the presentation of the judgment and sentence record of the defendant's previous felony conviction was not sufficient evidence to prove the former conviction.

We find this contention to be without merit. In the absence of rebutting evidence the judgment and sentence record alone is sufficient to support a finding that there had been a former conviction. Tucker v. State, 620 P.2d 1314 (Okl.Cr.1980).

Although there were numerous other propositions of error, they were not properly preserved for appeal.[1]

For all the reasons above set forth, the judgment and sentence appealed from is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA
THE HONORABLE JAY DALTON, DISTRICT JUDGE

MICHAEL MACK, appellant, was convicted in Tulsa County District Court, of Robbery with Firearms, After Former Conviction of a Felony, and sentenced to sixty (60) years' imprisonment. AFFIRMED.

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[1]Proposition three (3) stated that the court committed error in failing to instruct the jury properly concerning accomplice corroboration and accomplice liability.

Defendant's proposition four (4) contended that fundamental error occurred when the court failed to define the elements of robbery in the instructions to the jury.

Proposition five (5) was that the jury did not receive clear instructions concerning fear.

Proposition six (6) stated that the State failed to prove a prior conviction at the preliminary hearing.

Proposition eight (8) was asserted as error because evidence concerning a dog's actions at the scene of arrest was admitted.

Proposition nine (9) stated that the prosecutor made improper comments during the punishment stage of the trial which inflamed the jury and caused excessive punishment to be set.

Proposition of error ten (10) contended that the court erred in accepting an ambiguous punishment verdict.

Proposition eleven (11) stated that the trial court committed fundamental error in delegating the reading of jury instructions to a bailiff.

Propositions four (4), five (5), and six (6) were not preserved for appeal because no objection to the proposed error was made at trial.

Proposition nine (9) was not preserved for appeal. The defendant did not request that the jury be admonished to disregard the prosecution's comments. Sallee v. State, 544 P.2d 902 (Okl. Cr.1975).

Propositions three (3), eight (8), ten (10) and eleven (11) were not presented in the motion for new trial. See, Hawkins v. State, 569 P.2d 490 (Okl.Cr.1977).

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OPINION BY BUSSEY, J.
BRETT, P.J., CONCURS IN RESULTS
CORNISH, J., CONCURS

APPENDIX B

Petition for Rehearing in the Court
of Criminal Appeals of Oklahoma

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 22 1982
Ross N. Lillard, Jr.
CLERK

MICHAEL MACK,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-80-407

PETITION FOR REHEARING

The Petitioner, Michael Mack, appears by his attorney and requests that rehearing be granted in the above-styled case. The grounds for rehearing will be stated separately below.

I.

THIS COURT SHOULD RECONSIDER ITS VIEW REGARDING THE TRIAL COURT'S REFUSAL TO INSTRUCT ON THE DEFENDANT'S FAILURE TO TESTIFY. SUCH RECONSIDERATION IS NECESSARY BECAUSE THE QUESTION OF RETROACTIVITY IS NOT DISPOSITIVE OF THE FIFTH AMENDMENT ISSUE PRESENTED TO THIS COURT.

After determining that the Carter v. Kentucky decision should not have retroactive effect, this Court decided that it was permissible to deny Mr. Mack his requested instruction concerning his failure to testify. Petitioner does not contest this Court's determination that Carter should not be applied retroactively. Rather, petitioner asserts that the Carter decision should be applied to Mr. Mack's case because Mr. Mack's appeal was pending at the time of the Carter decision.

In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229 (1965), the Supreme Court held that it was violative of the fifth amendment to the United States Constitution for the prosecution to comment on the defendant's failure to testify. As the Court noted in a later decision, which is critical to a correct resolution of Mr. Mack's case, the Griffin decision has no retroactive effect. O'Connor v. Ohio, 385 U.S. 92, 87 S. Ct. 252 (1966). In spite of the lack of retroactive effect, defendant O'Connor, whose appeal was pending at the time of the Griffin decision, was entitled to the benefit of the Griffin rule. Id.

Thus, Mr. Mack is not arguing now that Carter should be given retroactive effect. There is no reason why Carter should be applied in connection with those defendants whose appeals were decided before Carter. Rather, Mr. Mack submits that the rule of O'Connor permits an appellant to rely on a Supreme Court decision when

the Supreme Court decision occurs between the time of appellant's trial and the time of the resolution of the appeal.

Mr. Mack submits that, under the fifth and fourteenth amendments to the United States Constitution, he should be awarded a new trial. See Carter v. Kentucky, 101 S. Ct. 1112 (1981).

II.

THIS COURT SHOULD RECONSIDER ITS DETERMINATION THAT THE EVIDENCE WAS SUFFICIENT SINCE THE "CORROBORATING" EVIDENCE DOES NOT CONNECT MR. MACK WITH THE CRIME.

This Court's determination of sufficient evidence appears to rest on the correct conclusion that witness Perkins and some other witnesses testified concerning some of the same details as did accomplice Bobby Trimble. However, Mr. Mack submits that it is not enough that someone agreed with Trimble on the basics of how the crime occurred. For there to be sufficient evidence, there needed to be evidence, independent of Trimble, connecting Mr. Mack to the crime. Mr. Mack submits that no such evidence existed and that consequently there was insufficient evidence as a matter of law.

The evidence from Perkins indicates that Trimble indeed was a participant in the crime — that Trimble knew what he was talking about when he made certain of his statements as to how the crime was committed. However, Perkins's testimony does nothing to remove the suspicion that Trimble was wrongfully implicating Mr. Mack to save Trimble's own skin.

Perkins admitted that she did not see Mr. Mack at the scene of the robbery or anywhere near the scene of the robbery, either in time or location. Therefore, her testimony is insufficient to corroborate Trimble's testimony. Mr. Mack submits that likewise no other witness's testimony provided the requisite type of corroboration.

In addition to the authorities cited in Proposition II of the Appellant's brief in this case, Mr. Mack wishes to rely on the recent case of Giddens v. State, Case No. F-78-164 (Okl. Cr. 1981) (unpublished decision). Mr. Macks submits that, if the principles set forth in Giddens were to be applied to Mr. Mack's case, a reversal would be necessitated in the case at bar. In Giddens, this Court quoted with emphasis the following statute: "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." 22 O.S. 1981, § 742. By statute, then, Perkins's testimony was not sufficiently corroborative

because her testimony showed only the commission of an offense and the circumstances of the commission. Further, the evidence which came from persons other than Perkins and Trimble was testimony which lacked the necessary independence from Trimble's testimony.

The Giddens case is particularly applicable because it shows that association between the accomplice and the defendant is not necessarily evidence corroborating the accomplice's story. In the instant case, evidence was presented, independent of Trimble, that Mr. Mack was in Trimble's company a few hours after the commission of the robbery. Similar association between the defendant and the accomplice was held to be insufficient in Giddens.

Mr. Mack submits that the lack of corroboration is much clearer in this case than it was in Giddens. It is further submitted that it would be impossible to justify upholding Mr. Mack's conviction without overruling a long line of Court of Criminal Appeals authority on accomplice corroboration.

III.

THIS COURT SHOULD REVIEW THE CONSTITUTIONAL ISSUE INVOLVED IN THE DETERMINATION THAT THE EVIDENCE OF PRIOR CONVICTION WAS SUFFICIENT. EVIDENCE OF PRIOR CONVICTION WAS INSUFFICIENT UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner agrees that, under Oklahoma authority which has existed for several years, the evidence of former conviction would be considered sufficient. However, since the time that Oklahoma began holding that a prior conviction could be established with only the presentation of judgment and sentence, it has been made clear that the fourteenth amendment to the United States Constitution requires that, for evidence to be sufficient, a reasonable person must be able to believe that beyond-reasonable-doubt proof exists. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2788 (1979). Further, it specifically has been held that identity of names between the defendant and the person previously convicted is insufficient to establish that the defendant is the person previously convicted. Gravatt v. United States, 260 F.2d 498 (10th Cir. 1958). See People v. Burnick, 27 Cal. App. 3d 326, 103 Cal. Rptr. 564 (1975).

In light of the above, Mr. Mack urges this Court to consider whether the evidence of prior conviction is sufficient under the fourteenth amendment to the United States Constitution.

IV.

THIS COURT SHOULD REEVALUATE THE EXTENT OF PRESERVATION OF THE ERRORS INVOLVING PROSECUTORIAL MISCONDUCT. THIS COURT ALSO SHOULD REEVALUATE THE SERIOUSNESS OF THE IMPROPRIETY.

In the footnote to this Court's opinion, this Court indicated that defense counsel did not request admonition in regard to instances of prosecutorial misconduct. Mr. Mack submits that in light of preservation beyond that which this Court apparently believed to be existent, see (Tr. 158), this Court should address the issue of prosecutorial misconduct on the merits. Further, it is clear that serious misconduct, such as that existing in Mr. Mack's case, should be reviewed even in the absence of objections or requests for admonition. E.g., Cobbs v. State, 629 P.2d 368 (Okl. Cr. 1981). In light of the above, the Court should reexamine the extent of prosecutorial misconduct in this case.

V.

THIS COURT SHOULD REEXAMINE CONTENTIONS THAT CERTAIN ASSIGNMENTS OF ERROR INVOLVED FUNDAMENTAL ERROR.

This Court, in footnote one of the opinion in this case, stated that it was declining to review certain of Mr. Mack's contentions. Mr. Mack urges this Court to reexamine its position that certain of these assignments of error involved fundamental error.

Of particular concern is this Court's apparent view that the defendant has no fundamental right to reasonably accurate instructions on the elements of the crime charged. Mr. Mack submits that it is basic to Oklahoma criminal law that the defendant has a fundamental right to instructions on the elements of the crime charged and to instructions concerning his defense. The fundamental right to instruction on the crime charged has long been recognized. Brook v. State, 6 Okl. Cr. 23, 115 P. 1026 (1911). Conviction when there has been no instruction accurately explaining the crime charged is in fact violative of the due process clause of the fourteenth amendment to the United States Constitution. See e.g., Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514 (1948).

VI.

THIS COURT SHOULD REEVALUTE ITS POSITION THAT CERTAIN ERRORS ARE BEYOND THE SCOPE OF THE MOTION FOR NEW TRIAL. SINCE APPLICABLE STATUTORY LANGUAGE WAS USED IN THE MOTION FOR NEW TRIAL, THE MOTION FOR NEW TRIAL WAS SUFFICIENT TO COVER THE ASSIGNMENTS OF ERROR PRESENTED IN PROPOSITIONS THREE, EIGHT, TEN, AND ELEVEN OF THE APPELLANT'S BRIEF.

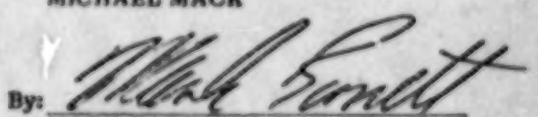
The Oklahoma statute on the grounds for new trial describes the grounds for new trial in general terms. Ground five is as follows: "When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial." 22 O.S. 1981, § 953. Ground six indicates that a new trial may be granted "[w]hen the verdict is contrary to the law or evidence." Id. In the instant case, similar language was used in Mr. Mack's motion for new trial. It was alleged that "the verdict is contrary to law" and it was alleged that there was "error of law occuring at the trial, excepted to by the Defendant." Mr. Mack submits that since the statute indicates that such general language is appropriate, the motion for new trial provided an adequate basis for reviewing all errors presented in the Appellant's brief.

CONCLUSION

For the above-stated reasons, Mr. Mack requests that this petition for rehearing be granted.

Respectfully submitted,

MICHAEL MACK

By: 

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APPENDIX C

Order of the Court of Criminal Appeals
of Oklahoma Denying Petition for Rehearing

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 25 1982
Ross N. Lillard, Jr.
CLERK

MICHAEL MACK,)
Appellant,)
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THE STATE OF OKLAHOMA,)
Appellee.)

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING ISSUANCE OF MANDATE

NOW on this 25th day of March, 1982, after having examined the appellant's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that the same should be and hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT this 25th day of March, 1982.

Tom Brett
TOM BRETT, PRESIDING JUDGE

Hez J. Bussey
HEZ J. BUSSEY, JUDGE

Tom R. Cornish
TOM R. CORNISH, JUDGE

ATTEST:

Robert T. Lillard Jr.
Clerk